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IN THE

SUPREME COURT OF THE UNITED STATES

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October Term, 1969

No. 410

JOHN ODEAN CASS,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

and

HOMER RAY PREVETTE,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioners, John Odean Cass and Homer Ray Prevette, pray that a Writ of Certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the judgment of the Court affirming judgment of the United States District Court for the Middle District of North Carolina.

OPINION BELOW

The judgment of the Court of Appeals for the Fourth Circuit (Petitioners' Appendix 1) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit sought to be reviewed was entered in the Office of the Clerk of said Court of Appeals on July 1, 1969. The jurisdiction of this court is invoked pursuant to Title 28, U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Does the decision of the United States Court of Appeals for the Fourth Circuit in this case conflict with the decision of the Court of Appeals for the Second Circuit in the case of United States of America, appellee, vs. Frank Ramona, 382 U.S. 136; 86 S. Ct. 279, decided November 22, 1965.

2. Did the Charge of the Court violate the due process clause of the Fifth Amendment and deny to the petitioners their rights as guaranteed thereunder?

3. Is the imposition of a more severe sentence for persons convicted by a jury than for the co-defendants who entered pleas of guilty a deprivation of the petitioners' rights for a jury trial as guaranteed under Amendment Six of the Constitution of the United States, when the co-defendants and their counsel have been ritualistically examined by the Court as to whether promises or threats or inducements have been held out to them and a plea of guilty has been entered by the co-defendants to one count and accepted by the court and the United States Attorney, and at the conclusion of the case the other two counts in the indictment dismissed against the co-defendants, and when the records and reputation of the petitioners show them to be hirelings rather than principals?

4. Have the petitioners been deprived of due process of law by: (a) The admission of finger print evidence by the court without a showing that the finger prints could have only been impressed at the scene of the crime, and (b) By the Charge of the Court?

5. Was the Court in error in failing to direct a verdict of acquittal at the close of all the evidence?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

26 U.S.C. 5173.

26 U.S.C. 5601 (a) (4).

26 U.S.C. 5222 and 5601 (a) (7).

26 U.S.C. 5205 (a) (2), 5604 (a) (1).

Constitution of the United States, Amendments 5, 6 and 14.

28 U.S.C. 1254.

STATEMENT OF THE CASE

The petitioners, John Odean Cass and Homer Ray Prevette, were indicted on or about March 15, 1968, in the Middle District of North Carolina, Salisbury Division, and charged in Count One with violation of 26 U.S.C. 5601 (a) (4), of carrying on the business of distillers of spirituous liquors without having given bond as required by 26 U.S.C. 5173; in Count Two with violation of 26 U.S.C. 5222 and 5601 (a) (7) - fermenting mash fit for distillation; and in Count Three of Violation of 26 U.S.C. 5205 (a) (2), 5604 (a) (1) - possessing distilled spirits. Also charged with these petitioners were Willis Edward Efird and Leo Mark Gregory.

When the petitioner, John Odean Cass, was arraigned before the Commissioner an attorney was appointed at the expense of the government. The petitioner Cass decided he did not want a court appointed attorney and paid the court attorney and then employed his own counsel, and these petitioners have paid at their own cost and expense the costs of the trials and appeals, including attorney's fees.

When arraigned the co-defendant, Efird, through his counsel, entered a plea of guilty to Count Three - possession of distilled spirits, and the co-defendant Gregory entered a plea of guilty on Count One - carrying on the business of distillers. After a lengthy examination by the Court as to whether any promises or threats had been made to induce the two co-defendants to enter a plea the same was accepted by the Court.

The petitioners, John Odean Cass and Homer Ray Prevette, pleaded not guilty as to all three counts and were tried by a jury and convicted as charged.

On page 459 of the Record it is shown that Counts Two and Three were dismissed by the Court as to the petitioners' co-defendant, Gregory.

On page 455 of the Record counts one and two were dismissed by the Court as to the petitioners co-defendant, Efird.

Whereupon the court consolidated the counts for judgment and imposed a sentence of 36 months on each of the petitioners, and imposed sentence on the co-defendant Efird of 24 months and on the co-defendant Gregory of 30 months.

The petitioners appealed to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals by per curiam opinion affirmed the District Court.

STATEMENT OF FACTS

On March 15, 1968 government agents, after having had a farm in Cabarrus County under surveillance for approximately ten days, and which farm had located thereon a bungalow residence, a shed or building which was used for the storage of one car and a grainery combination. On the opposite side of the house was another small outbuilding and beyond this outbuilding was a barn. There was a circular drive around the house emptying into a public paved road, and a road leading from the circular drive to the barn by the smaller outbuilding.

From where the surveillance post was set up by the officers 750 to 1,000 feet from the residence a paved road divided the farm. The distillery was located in an underground room covered over by soil similar to the field. The entrance to the underground distillery was on the side opposite from the observation post and was concealed by hay. When the officers removed the hay a trap door led down to the distillery. The mash, distilled spirits and distillery were all in this underground room.

The petitioners' co-defendant Efird with his family had lived at this house for approximately four years. Officer Foxworth was at the observation post 750 to 1000 feet from the residence when he saw three men come in to the premises in a 1964 Dodge automobile. One of the men crossed the road and walked down to near where Foxworth was, and the government contends that this man was the petitioner, Homer Ray Prevette. When Foxworth saw this man, who fled, the officers converged on the farm. The three men who had come in the Dodge automobile had disappeared. The Dodge automobile was located to the right of the house in the little building referred to above. The distillery was not in operation at the time of the seizure. The petitioners were never seen within the enclosure of the underground room.

The finger prints of the petitioner Cass were lifted from a soft drink can and from the outside of a yeast can, which cans were located in the enclosure. Fingerprints alleged to have been those of the petitioners Cass and Prevette were taken from the 1964 Dodge.

The petitioners' co-defendants Gregory and Efird were arrested the day of the seizure. The petitioners were not notified that they were suspected of being the defendants until about thirty days later when they were notified to report at the Commissioner's office.

FEDERAL JURISDICTION

This was a criminal action instituted by the United States upon an indictment charging the petitioners with the violation of criminal statutes under the Internal Revenue Code, 26 U.S.C. 5173; 26 U.S.C. 5601 (a) (4); 26 U.S.C. 5222 and 5601 (a) (7), and 26 U.S.C. 5205 (a) (2), 5604 (a) (1). This was the basis for Federal jurisdiction of this case.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The decision of the Court of Appeals in this case results in a deprivation of the petitioners' rights of due process of law and conflicts with the decision of the Second Circuit and is in conflict with the holdings of the decisions of the Supreme Court as follows:

(a) In the case of United States vs. Frank Romano as reported in 330 Fed 2d 566;

(b) In the case of United States vs. Frank Romano et al, 382 U.S. 136; 86 S. Ct. 279 (1965):

(c) United States Constitution, Amendments 5 and 14, sec. 1.

The petitioners respectfully contend that at no time during the surveillance by the officers were they ever seen in the enclosure of the underground still or in the vicinity thereof, and for the Court to charge the presumption as set out in Title 26 U.S.C. 5601 (b), and sub-sections thereunder, clearly deprives these petitioners of due process of law as there is no presumption by statute or otherwise. That unless the defendants were present at an operating distillery (by present meaning in the room or enclosure) could the presumption be valid and be a proper charge by the Court to the jury. There

is no presumption set out by law as to possessing distilled spirits, which is Count Three, and no way of knowing how much emphasis the jury gave on the possession count to the presence of the petitioners on the farm, or vice versa. There is no evidence in the record that the officers identified these petitioners at any time as being on the farm and at this residence, that the distillery was in operation and that any mash was being made or fermented, or that any nontaxpaid liquors were possessed outside of the enclosure.

In 330 Fed 2d 566, Frank Romano and John Ottiano were found quilty by a jury of possession of a distilling apparatus. They were also found quilty of producing distilled spirits and of conspiracy on Count Three. The Court, Lumbard, Chief Judge, reversed the case on Counts 1 and 2. It is called to the attention of this Court that the two defendants, Frank Romano and John Ottiano were standing several feet from the distillery which was located in a series of buildings belonging to the Griswold Corporation. We quote the following from the Opinion in the Romano case:

> "(8) We come to the one meritorious claim by the appellants. This related to Judge Clarie's instruction to the jury as to counts 1 and 2, informing them of the presumptions in 26 U.S.C. sec. 5601 (b) (1) and (4). With regard to count 1, charging unlawful possession of a distilling apparatus, Judge Clarie read § 5601 (b) (1) as follows:
>
> > " '(b) Presumptions. -
> > '(1) Unregistered stills. - Whenever on trial for violation of subsection (a) (1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered,

such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury.' "

"Judge Clarie also advised the jury with regard to count 2, which charged the defendants with producing distilled spirits without being authorized by law to do so, that the similar presumption set out in § 5601 (b) (4) may be applied, where a defendant is shown to have been at the still site. These presumptions of course could apply only to the defendants Frank Romano and John Ottiano who were found present at the still site where spirits were being illegally produced. Although these presumptions do not require the jury to conclude from the unexplained presence of the defendant at the still site that the defendant is in possession and control of the still, the result is, nonetheless, that with no other evidence against the defendant the jury may find the defendant guilty as charged.

"We are of the view that to apply these presumptions to persons shown to have been at the still would violate the due process clause of the Fifth Amendment. Barrett v. United States, 322 F.2d 292 (5 Cir. 1963), certiorari granted 375 U.S. 962, 84 S.Ct. 489, 11 L.Ed 2d 413 (1964). Proof of the fact on which the statutory presumption is based, namely presence, must carry a reasonable inference of the ultimate fact presumed, of the still or is distilling spirits. The inference here is too strained and is not reasonably related to the fact proved. For example, one found present at a still may as well

be a purchaser of the distilled product or a visitor for some other business purpose.

"The presumptions here involved are totally unlike the one created when unexplained possession of narcotic drugs is shown. For the 'legitimate possession (of opium) **** is so highly improbable that to say to any person who obtains the outlawed commodity, 'since you are bound to know that it can not be brought into this country at all, except under regulation for medicinal use, you must at your peril ascertain and be prepared to show the facts and circumstances which rebut, or tend to rebut, the natural inference of unlawful operation, or your knowledge of it,' is not such an unreasonable requirement as to cause it to fall outside the constitutional power of Congress. See Hem v. United States 268 U.S. 178, 45 S. Ct. 470, 69 L.Ed. 904 (1925). We find that the presumptions set out in § § 5601 (b) (1) and (4) fall outside the constitutional power of Congress. There is no broad ground of experience which supports the conclusion that people present at a still site are in possession or control of the distilling operation on that site in such a large proportion of such instances that a jury may be instructed that it may draw such a conclusion in the absence of any explanation.

(9) While the evidence against Frank Romana and John Ottiano, apart from the presumptions, was ample, we cannot speculate as to what weight the jury might have given to the presumptions in reaching its finding of guilt on these two counts. Therefore the convictions of these two defendants under

counts 1 and 2 must be reversed. As Judge Clarie made it clear that the presumptions were limited to those present and to counts 1 and 2 only, and as proof of the conspiracy was more than sufficient to sustain the verdict on count 3, we affirm the convictions on count 3 and we affirm the convictions of Edward Romano and John Vellucci under count 2."

In the Romano case the petitioner filed a petition for a Writ and the same was allowed and an opinion was reached on November 22, 1965, and cites as 382 U.S. 136, and 86 S. Ct. 279. The Supreme Court, Mr. Justice White, held that statute providing that the presence of defendant at site of illegal still shall be deemed sufficient evidence to authorize conviction for possession, custody and control of illegal still, unless defendant explains such presence to satisfaction of jury, was unconstitutional.

We quote the following head notes from the case of United States vs. Frank Romano et al, 86 S. Ct. 279:

"In absence of some showing of defendant's function at operating still, connection of defendant's presence there with possession of illegal still is too tenuous to permit reasonable inference of guilt. 26 U.S.C.A. (I.R.C. 1954) § 5601 (a) (1), (b) (1)."

"Statute providing that presence of defendant at site of illegal still shall be deemed sufficient evidence to authorize conviction for possession, custody and control of illegal still, unless defendant explains such presence to satisfaction of jury, was unconstitutional. 26 U.S.C.A. (I.R.C. 1954) § 5601

(a) (1), (b) (1); U.S.C.A. Const. Amend. 5."

The opinion of the Court was delivered by Mr. Justice White, and we quote the following from his Opinion:

> "The test to be applied to the kind of statutory inference involved in this criminal case is not in dispute. In Tot v. United States, 319 U.S. 463, 63 S. Ct. 1241, 87 L.Ed. 1519, the Court relying on a line of cases dating from 1910, reaffirmed the limits which the Fifth and Fourteenth Amendments place 'upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated.' Id., at 467, 63 S. Ct., at 1245. Such a legislative determination would not be sustained if there was 'no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. * * * (W)here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts.' Id., at 467-468, 63 S. Ct., at 1245. Judged by this standard, the statutory presumption in issue there was found constitutionally infirm.
>
> "Just last Term, in United States v. Gainey, 380 U.S. 63, 85 S. Ct. 754, 13 L.Ed 2d 658, the Court passed upon the validity of a companion section to 8.5601 (b) (1) of the Internal Revenue Code. The

constitutionality of the legislation was held to depend upon the "rationality of the connection 'between the facts proved and the ultimate fact presumed.' " 380 U.S., at 66, 85 S. Ct., at 757. Tested by this rule, the Court sustained the provision of 26 U.S.C. § 5601 (b) (2) declaring presence at a still to be sufficient evidence to authorize conviction under 26 U.S.C. § 5601 (a) (4) for carrying on the business of the distillery without giving the required bond. Noting that almost anyone at the site of a secret still could reasonably be said to be carrying on the business or aiding and abetting it and that Congress had accorded the evidence of presence only its 'natural probative force,' the Court sustained the presumption.

"This case is markedly different from Gainey, supra. Congress has chosen in the relevant provisions of the Internal Revenue Code to focus upon various phases and aspects of the distilling business and to make each of them a separate crime. Count 1 of this indictment charges "possession, custody and * * * Control" of an illegal still as a separate, distinct offense. Section 5601 (a) (1) obviously has a much narrower coverage than has Section 5601 (a) (4) with its sweeping prohibition of carrying on a distilling business.

"In Bozza v. United States, 330 U.S. 160, 67 S. Ct. 645, 91 L. Ed. 818, the Court squarely held, and the United States conceded, that presence alone was insufficient evidence to convict of the specific offense proscribed by Section 5601 (a) (1) absent some evidence that the defendant engaged in conduct directly related to the crime of possession,

custody or control. That offense was confined to those who had "custody or possession" of the still or acted in some "other capacity calculated to facilitate the custody or possession, such as, for illustration service as a caretaker, watchman, lookout, or in some other capacity." Id., at 164, 67 S. Ct., at 648. This requirement was not satisfied in the Bozza case either by the evidence showing participation in the distilling operations or by the fact that the defendant helped to carry the finished product to delivery vehicles. These facts, and certainly mere presence at the still, were insufficient proof that "petitioner ever exercised, or aided the exercise of, any control over the distillery." Ibid.

"Presence at an operating still is sufficient evidence to prove the charge of "carrying on" because anyone present at the site is very probably connected with the illegal enterprise. Whatever his job may be, he is at the very least aiding and abetting the substantive crime of carrying on the illegal distilling business. Section 5601 (a) (1), however, proscribes possession, custody or control. This is only one of the various aspects of the total undertaking, many of which have nothing at all to do with possession, as Bozza made quite clear and as the United States conceded in that case. Presence tells us only that the defendant was there and very likely played a part in the illicit scheme. But presence tells us nothing about what the defendant's specific function was and carries no legitimate, rational or reasonable inference that he was engaged in one of the specialized functions connected with possession, rather than in one of the supply, delivery or opera-

> tional activities having nothing to do with possession. Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt - "the inference of the one from proof of the other is arbitrary * * *". Tot v. United States, 319 U.S. 463, 467, 63 S. Ct. 1241, 1245, 87 L.Ed. 1519."

The Court in charging the presumption in the case at Bar did not give the proper interpretation and the normal meaning of the words "anyone at the site of a secret still". For these petitioners never were seen within the enclosure where the still was located or where the mash was fermented or where the nontaxpaid liquor was and certainly if the presumption for possessing a distillery is unconstitutional the petitioners have been deprived of their rights of due process by the charge of the Court in this case.

The petitioners allege that the ritualistic examination as carried out in this case as to the co-defendants is of national importance to the Courts, the defendants, and the public at large. That if it is required that a defendant be fully advised of his rights and fully inquired into as to whether any promises or threats have been made to him to induce him to plead guilty that the mere recital by the Court and the response by the defendant when on its face and as is reflected by the record in this case at bar the co-defendants knew that the two counts in the indictment would be dismissed before sentence was imposed and all parties participating, unless it be the Court itself, knew that such action was going to be taken and whether you consider it as a promise or understanding it was there and the co-defendants knew that the maximum punishment they could receive would be 5 years imprisonment and a $10,000 fine, and if it was not a promise then why were the petitioners tried on the three counts in the

indictment instead of selecting one to try them on, and this Court ought to grant certiorari in this case to inquire into the methods prescribed for examination of defendants, these petitioners contending that their constitutional rights were violated by requiring them to answer on three counts before a jury.

The petitioners contend that the Constitution guarantees to all persons the right of trial by a jury and if they elect to request and have a jury trial and are given additional punishment then jury trials are not a guaranty, but are something that if you want to take your chance you can expect to pay the price. In this case one of the co-defendants, Efird, lived on this farm and had lived there for approximately four years and testimony of the officers was that the distillery had probably been in operation for four to seven years, and this said co-defendant Efird who lived on the farm received a sentence of 24 months on Count 3, and the petitioners' other co-defendant, Gregory, who entered a plea on the first count, and who the officers testified was foreman of the job and who had a record for violating the Internal Revenue laws since 1939, and who also had the reputation of being the foreman of the job for the syndicate, received a sentence of 30 months on Count one. The other two counts being dismissed against him after the petitioners had been convicted on the three counts.

The petitioners were young men. Cass, with no federal criminal record and had served in the United States Army, received a sentence of 36 months on the three counts which were consolidated for judgment.

It is contended by the petitioners that they have been deprived of their rights under the due process clause of the Fifth and Fourteenth Amendments. That the additional punishment, which they contend it is, is the equivalent of depriving them of their right of trial by a jury, and this court

ought to grant Certiorari in this case and that the case ought to be reviewed.

Your petitioner respectfully prays that this court grant the petition for writ of certiorari for the reasons as set forth hereinabove.

Respectfully submitted.

s/ *Raymond Kyle Hayes*

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,047

United States of America, Appellee,

versus

John Odean Cass, Appellant.

No. 13,048

United States of America, Appellee,

versus

Homer Ray Prevette, Appellant.

Appeals from the United States District Court for the Middle District of North Carolina, at Salisbury. Eugene A. Gordon, District Judge.

(Argued June 13, 1969. Decided July 1, 1969).

Before Haynsworth, Chief Judge, and Boreman and Winter, Circuit Judges.

Kyle Hayes for Appellant, and William H. Murdock, United States Attorney, (Richard M. Dailey, Jr., Assistant United States Attorney, on brief) for Appellee.

PER CURIAM:

After consideration of the briefs and oral argument, we find no error.

Affirmed.